IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

LETTERS PATENT APPEAL No 54 of 1998

in

SPECIAL CIVIL APPLICATIONNo 4926 of 1987

For Approval and Signature:

Hon'ble MR.JUSTICE C.K.THAKKER and
MR.JUSTICE A.L.DAVE

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1. Whether Reporters of Local Papers may be allowed to see the judgements?

2. To be referred to the Reporter or not?

3. Whether Their Lordships wish to see the fair copy of the judgement?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?

5. Whether it is to be circulated to the Civil Judge?

NARESHKUMAR CHHAGANBHAI NAYAK

Versus

STATE OF GUJARAT

Appearance:

MRS KETTY A MEHTA for Appellants

MR DA BAMBHANIA for Respondent No. 2

CORAM : MR.JUSTICE C.K.THAKKER and
MR.JUSTICE A.L.DAVE

Date of decision: 12/02/98

ORAL ORDER

1. Mrs. K.A. Mehta, learned counsel for the appellants, seeks leave to delete names of appellants No. 4, 6, 7, 8, 9 and 14. Leave granted.

2. This appeal is filed against judgment and order

passed by the learned Single Judge in Special Civil Application No.4926 of 1987, decided on December 1, 1997. By the said order, the learned Single Judge dismissed the petition filed by the appellants.

3. Appellants are the original petitioners. They filed Special Civil Application No.4926 of 1987 for the following reliefs :-

"(A) Your Lordships may be pleased to allow and admit this writ petition and may kindly issue a writ of mandamus and/or a writ of certiorari and/or a writ of prohibition or any other appropriate writ, order or direction in the nature of mandamus, certiorari or prohibition or any other appropriate writ restraining the respondents from terminating the services of the petitioners from the month of September 29th and/or October 1987 or any time thereafter.

(B) Your Lordships may be pleased to direct the respondents by a suitable writ, direction or order to treat the petitioners as regular employees with regular benefits of service and with continuity of service with retrospective effect on regular and permanent posts and treat the petitioners as regular government servants with retrospective effect and give them all the benefits that would accrue to regular government employees with retrospective effect.

(C) Pending the admission, hearing and final disposal of this petition, Your Lordships may be pleased to restrain the respondents from terminating the services of the petitioners.

(D) Your Lordships may further direct, in the alternative, that the respondents to offer the petitioners permanent employment on the existing vacant posts and/or prospective vacant posts, on regular and permanent basis.

(E) Pending the admission, hearing and final disposal of this petition, Your Lordships may also suitably direct the respondents

to offer employment to the petitioners on the existing vacant posts or on the prospective vacant posts with the State Government either in the district of Valsad or any other district of State of Gujarat.

(F) An ex-parte ad-interim relief in terms of paras (A) to (F) may please be granted.

(G) Costs of this petition may be awarded from the respondents.

(H) Any other relief that Your Lordships deem fit in the interest of justice may also be granted."

4. From the relief clause, it is clear that an appropriate writ, direction or order is sought restraining the respondent authorities from terminating services of the petitioners from September/October 1987 and or any time thereafter; that they should be made regular and permanent employees by giving continuity in service with retrospective effect and consequential benefits as would have been accrued to them. In the alternative, a prayer was made that the appellants (petitioners in the petition) may be made permanent employees on existing vacant posts and/or prospective vacant posts on regular and permanent basis. Interim relief was also sought by directing the respondent authorities to offer employment to the appellants on the existing vacant posts and/or prospective vacant posts and by not terminating their employment.

5. Rule was issued on 22nd September, 1987 and interim relief in terms of paragraph 17(C) was granted upto September 30, 1987. It appears that ad-interim relief was continued from time to time.

6. When the petition came up for final hearing after hearing the learned counsel for the parties, the learned Single Judge held that the appellants were not entitled to the reliefs claimed in the petition. In the opinion of the learned Single Judge, the appointments of the petitioners were not regular and in accordance with law and, hence, they had no right to claim regularisation by invoking extraordinary powers under Article 226 of the Constitution. No case was made out to interfere with the action of termination taken or to be taken against them and the petition was liable to be dismissed. In paragraph 9 of the judgment, however, the learned Single

Judge observed as:

> "In the result this Special Civil Application fails and the same is dismissed. However, it is made clear that as and when the respondents undertake to make selection to the category of Class IV employees or driver, then in case the petitioners apply for the posts, their candidature may not be rejected only on the ground of age eligibility, subject to the condition that the petitioners or the concerned petitioner was within age limit when he was given first fixed term appointment on daily wage basis(emphasis supplied)..."

7. Mrs. Mehta, learned counsel for the appellants raised various contentions. She contended that the learned Single Judge has committed an error of law in holding that the appointments of the appellants were for fixed term. There was another error on the part of the learned Single Judge in holding that it was a "back door entry". According to her, the appointments were long term appointments and since many years, the appellants were continued in service. In exercise of power conferred on the officers, appointments were made of the persons whose names were registered with the Employment Exchange. Taking into account experience and past service record of the appellants, such appointments were made which cannot be said to be illegal, invalid or contrary to law. The counsel submitted that the action of the respondent-authorities was arbitrary, discriminatory, unreasonable and violative of Articles 14 and 16 of the Constitution. For that purpose, reliance was placed on paragraph 5 of the petition,in which names of certain employees, who were junior to the appellants were mentioned and it was argued that, though they were junior to the appellants and similarly situated to appellants, their services were regularised, whereas similar treatment was not shown to the appellants.

8. Reliance was placed on various decisions of the Supreme Court. We will deal with them at a later stage.

9. We do not see any reason to interfere with the judgment and order of the learned Single Judge. We have been taken to various orders passed by the authorities from time to time. The counsel was not able to show even a single case wherein there were continuous orders pursuant to which an employee was continued in service till the date on which the petition was filed. No doubt, according to the appellants, their services were

uninterrupted and all the appellants were performing their functions and discharging their duties continuously. Only thing was that artificial breaks were given and that is how such orders were passed to create an impression that the appellants were not continuously working from the date of their first appointment. The fact, however, remains that the counsel for the appellant could not produce any material to show that any of the appellants continued from the date on which initial appointment was made.

10. Now, in the light of this eloquent circumstance, the question was considered by the learned Single Judge. The learned Single Judge was also having benefit of affidavit in reply filed by the Deputy Collector, Valsad, wherein, it was stated that the appellants were appointed under respondent No.1 on purely temporary basis. They were not appointed through regular channel of recruitment. Without giving opportunity to other deserving candidates, temporary appointments on purely ad-hoc basis were given to them. Such appointments were made where there were leave vacancies and/or there was some additional workload and regular recruitment to the post in question was likely to take time. It was stated that though the appellants were aware that their appointments were temporary and that they had no right to get regularisation, they accepted the appointment. Thus, the appellants had no right either legal or fundamental to approach the Court. Regarding artificial break, the deponent has stated that no artificial break was given but "the appellants were being employed from time to time looking to the needs of the administration". It was asserted that when it was found that services of particular persons were not required, they were not continued and they were re-appointed as and when the occasion arose. It was also the case of the respondents that when the petition was filed, some of the employees were not in actual service. That fact, however, was not disclosed and they had obtained interim relief. In paragraph 7, it was stated:

> " .....It is submitted that while making regularly appointments chances are given to deserving candidates and all applicants are interviewed and, therefore, most meritorious persons are given appointments. In case of the petitioners, their appointments were made without giving any opportunity to other deserving candidates for competing at the time of interview. It is submitted that the petitioners were given temporary appointments without

considering their age, qualifications, etc. It may be submitted here that a person having more qualification is not also appointed to the post of peon. It is submitted the persons were not given details about their age, qualifications and, therefore, it is not possible to say they are in fact qualified to be appointed as peons at the when they are temporarily appointed as peons, drivers, etc."

11. Regarding violation of Articles 14 and 16 of the Constitution, in paragraph 9 of the counter, it was stated that persons whose names were mentioned in paragraph 5 of the petition "were given regular appointments after following necessary procedure for recruitment of peons or driver".

12. In the light of the pleadings of the parties and material on record as also affidavit in reply on behalf of the respondents, the learned Single Judge, in our opinion, rightly held that no case was made out to grant relief as prayed in the petition. In our view, the learned Single Judge was right in observing that it was not a regular and permanent appointment. According to Mrs. Mehta, it cannot be said to be a fixed term appointment as it was for a period of 29 days which was continued from time to time and mere artificial break does not make termination legal or lawful. We are afraid, we cannot uphold the contention of the learned counsel. But even otherwise, when the appointment was not on permanent post in accordance with the procedure for recruitment and in the appointment order itself, it was stated that it would come to an end after a particular period without assigning any reason or ground, the employee cannot claim permanency benefits or regularisation. As stated by the deponent in affidavit in reply, because of certain exigencies and with a view to avoid administrative difficulties or due to scarcity work or administrative inconvenience, appointments were made. In these circumstances, by not issuing a writ of mandamus in exercise of extraordinary powers under Article 226 of the Constitution, the learned Single Judge cannot be said to have committed any error of law which requires interference by us. Again, in our view, the learned Single Judge was right in observing that the appointments were not made in accordance with the procedure prescribed by law. It was specifically stated in affidavit in reply that, without following due procedure for making regular appointments, temporary and/or ad-hoc appointments were made and the appellants

had no right to get benefits of regularisation.

13. In our opinion, none of the cases cited by the learned counsel helps the appellants. In H.C. Puttaswamy v. Hon'ble Chief Justice of Karnataka, AIR 1991 SC 295, certain appointments were made by the Chief Justice of High Court contrary to Rules in force. Appointments were to be made in consultation with Public Service Commission under the relevant Rules, which was not done. The appointees continued for a period of ten years. Considering the said fact, the Supreme Court observed that "on humanitarian ground, all the appointees are directed to be treated as regularly appointed with all the benefits of past service". Thus, in the light of the fact that the persons were serving since ten years, they were ordered to be treated as regularly appointed In the instant case, the appellants were not in continuous service. Even according to them, break was given though it was argued that such break was artificial. On the other hand, it was the case of the respondents that the appellants were appointed as and when the occasion arose and as soon as the work was over, services were terminated and again when contingency or necessity arose, they were reappointed, and there was no artificial break nor continuous appointment. Thus, the above ruling does not assist the appellants.

14. In State of U.P. v. Sant Lal, AIR 1991 SC 1824, a single employee, who had worked for about 28 years, was ordered to be regularised in service by granting all benefits, including promotion. It is, thus, clear that, he was in service for about three decades. There is no mention of any break and/or appointment and re-appointment from time to time. When an order of termination was issued, he approached U.P. State Services Tribunal and matter reached the Supreme Court. In our opinion, the ratio laid down in that case would not apply to the case on hand.

15. Lastly, strong reliance was placed on State of Haryana and Others v. Piara Singh and Others, (1992) 4 SCC 118. The Honourable Supreme Court, in that case, issued certain directions in connection with regularisation of temporary and ad-hoc employees. The counsel placed reliance on paragraphs 44 to 48 of the reported decision wherein the Supreme Court directed the State Government to consider certain relevant factors. In paragraph 49, the Court observed:

> "49. If for any reason, an ad-hoc or temporary employee is continued for a fairly long spell,

> the authorities must consider his case for regularisation provided he is eligible and qualified according to the rules and his service record is satisfactory and his appointment does not run counter to the reservation policy of the State."

In our opinion, even that decision does not carry the case further. As is clear, the case of the respondents from the beginning was that appointments were temporary and ad-hoc and as soon as the work was over, services of the appellants came to an end. When again necessity arose, appointments were made. But it was never continued. Therefore, there was no question of giving artificial break, as contended by the appellants. In the light of affidavit in reply and on the basis of appointment orders and material on record, if the learned Single Judge has not issued a writ of mandamus by directing the State Government to regularise the services of the appellants, in our opinion, it cannot be said that there was an error on the part of the learned Single Judge.

16. So far as Articles 14 and 16 are concerned, it was the case of the respondent authorities that those persons were given regular appointments after following procedure for recruitment of peons and drivers. Counsel for the appellants submitted that in their case also such a procedure can be followed. It is open to the respondents to do so. In fact, the learned Single Judge has directed in paragraph 9, as extracted hereinabove, that as and when the respondents will undertake selection of Class IV employees or drivers, the cases of the appellants (petitioners) will not be rejected only on the ground that they would be age barred. But the prayer that till then, their services should be continued, in our opinion, cannot be granted. Thus, the case of the appellants cannot be said to be similar to that of the persons whose names were mentioned in paragraph 5 of the petition and the learned Single Judge was right in observing that Articles 14 and 16 had no application. Even otherwise also, it is settled law that Article 14 is a positive concept and not a negative one and even if the appellants are in a position to convince the Court that in one case some illegality or irregularity was committed, they cannot invoke extraordinary powers relying on Article 14 for getting a direction to the authorities to commit similar illegality which was committed in other cases. As is well settled, that is not the sweep of Article 14.

17. It was finally submitted that, as on today, the appellants have completed more than 15 years in service and that may be considered to grant some relief in their favour. Now, from the facts, it is not borne out that all the appellants were appointed before 1981-82. Some of the orders were of 1985-86 of 1986-87. Again, if we read affidavit in reply, services of the appellants were terminated and they were reappointed from time to time. That apart, since more than ten years, the appellants were continued under interim order of the Court. To recall, the petition was filed in 1987 and ad-interim relief was granted. In our considered view, that fact would not come in the way of the respondent authorities if they have right to terminate services of the appellants.

18. We, therefore, do not see any reason to interfere with the order passed by the learned Single Judge. The appeal deserves to be dismissed and is accordingly dismissed.

19. Learned counsel for the appellants prays that ad-interim relief may be continued for some time. Mr. Bambhania, Addl. G.P. objects to such prayer. The order of the learned Single Judge is dated 1.12.1997 and we are hearing the matter on February 12, 1998, and when we are not entertaining appeal, no such prayer can be granted. Hence, prayer is rejected.

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